

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LORNE ALDER,

Defendant-Appellant.

UNPUBLISHED

July 29, 1997

No. 191597

Macomb Circuit Court

LC No. 94-002369-FC

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, J.J.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). The trial court sentenced defendant to life imprisonment without parole. Defendant now appeals as of right. We affirm defendant's first-degree premeditated murder conviction, vacate his felony murder conviction, and remand for correction of the judgment of sentence.

First we agree with defendant's argument that his convictions for first-degree premeditated murder and felony murder violate double jeopardy. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). Where a defendant is convicted of both first-degree and felony murder for the slaying of a single individual, the conviction of felony murder must be vacated. *Id.* Hence, the trial court should have vacated the felony murder conviction and sentenced defendant for the first-degree premeditated murder conviction. However, because the judgment of sentence lists only defendant's felony murder conviction, we remand so that the trial court may file a corrected judgment of sentence indicating that defendant was convicted and sentenced for first-degree premeditated murder.

Next, defendant argues that there was insufficient evidence from which the jury could determine beyond a reasonable doubt that he was guilty of first-degree premeditated murder. We disagree.

When reviewing a ruling on a motion for directed verdict, we must consider the evidence presented by the prosecutor up to the time the motion was made and determine whether a rational trier of fact could find proven beyond a reasonable doubt the essential elements of the charged crime. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). To establish first-degree

murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing and evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.* Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *Id.*; *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Moreover, MCL 767.39; MSA 28.979, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id.* Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569. To sustain an aiding and abetting charge, the guilt of the principal must be shown. *Id.*

The evidence indicates that the victim willingly left a bar with defendant and Christopher Tull. Once the three arrived at defendant's house, Alan Klakulak awoke and watched while laying on a couch. Klakulak testified that defendant pulled the victim into his bedroom by grabbing her arm and waist, while she said "no" approximately three times. While defendant, Tull, and the victim were in the bedroom, Klakulak heard defendant tell the victim how powerful he was and heard him order her to perform fellatio or he would "bash [her] head in." Later, Klakulak saw defendant and the victim enter the bathroom, where the victim appeared to be on her hands and knees and rocking back and forth. Defendant, the victim, and Tull returned to the bedroom. Defendant subsequently went outside and returned with a paper bag in his hand. Klakulak then saw the three leave the bedroom. A paper bag covered the victim's head. Defendant and Tull had the victim by her arms and guided her out of the house.

Klakulak heard defendant open and close the garage door before he left with Tull and the victim. Another witness saw defendant begin to get in the pickup truck, then go back, after which he heard a clinking noise that sounded like metal hitting metal. The witness then saw defendant pulling his hand out of the bed of the pickup truck as if he had just put something there. A short time later, defendant filled a container with gasoline at an Amoco station near his house. The victim was then driven to a building approximately seven miles away where her body was burned. An autopsy revealed

that the victim was killed by a gag that had been forced down her throat. When defendant was apprehended, he had first- and second-degree burns on his right hand, wrist and leg.

From this evidence we conclude that the jury could reasonably have found that defendant either intentionally killed the victim himself or aided and abetted Tull in killing her and that the killing was premeditated and deliberate. Although defendant claims that Tull killed the victim without defendant's knowledge while he was asleep in the truck, the jury was entitled to weigh defendant's credibility and disbelieve him. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Therefore, we find that there was sufficient evidence from which a rational jury could determine beyond a reasonable doubt that defendant committed first-degree premeditated murder.¹

Defendant next argues that the trial court's instruction to the jury on aiding and abetting was erroneous and that the trial court erred by not sua sponte instructing the jury that they could convict him if the actions of Christopher Tull exceeded the common criminal enterprise. Because defendant neither objected to the trial court's aiding and abetting instruction, nor requested the common enterprise instruction, appellate review is foreclosed unless necessary to prevent a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 177; ___ NW2d ___ (1997). Upon reviewing the trial court's jury instructions, we find that they were proper. Therefore, no miscarriage of justice will result by our refusal to fully review this issue.

Defendant also claims that he was denied the effective assistance of counsel by his attorney's failure to object to the court's jury instruction on aiding and abetting and request a common criminal enterprise instruction. Because the court's jury instructions were proper, defense counsel's objection or request would not have affected the outcome of trial, and therefore defendant was not denied his right to the effective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996).

Defendant next argues that he was denied a fair trial by virtue of prosecutorial misconduct. Defendant objected to only one of the instances of alleged misconduct he raises on appeal. Appellate review of these unchallenged comments is precluded unless our refusal to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where defendant objected to the prosecutor's comment, the test of misconduct by the prosecutor is whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Issues of misconduct by a prosecutor are decided case by case. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* A prosecutor may not argue facts not entered into evidence. However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659. Nevertheless, prosecutors should not express their personal opinions of a defendant's guilt. *Id.* at 282-283.

Defendant claims that the prosecutor improperly attacked his credibility during rebuttal closing argument when he stated the following:

And ask yourself if anyone who could burn a 19-year-old girl's body, without any problems burn that body, would they hesitate one second to get in here and lie about their activity?

We assume that by stating that the prosecutor "improperly attacked defendant's credibility," defendant is arguing that the prosecutor expressed his personal belief in defendant's guilt. Taken in context, the prosecutor posed a legitimate question to the jury regarding whether defendant could be considered credible in light of the fact that he admitted to burning the victim's body but claimed to be asleep in the truck while Christopher Tull killed her. Therefore, defendant was not denied a fair and impartial trial by the prosecutor's comment.

Defendant did not object to the remainder of the prosecutor's comments that he argues were improper. After a thorough review of the record, we find that a majority of the prosecutor's comments were not improper, or, if marginally improper, could have been adequately addressed by timely requested curative instructions. Accordingly, a miscarriage of justice will not occur if we decline to fully review this issue.

Defendant also argues that he was denied effective assistance of counsel by his attorney's failure to object to the prosecutor's improper comments. However, because none of the prosecutor's comments would have affected the outcome of trial, defendant was not denied his right to the effective assistance of counsel. *Stewart, supra* at 41.

We affirm, but remand for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

¹ Because it is necessary to vacate defendant's felony murder conviction, we do not address his argument that there was insufficient evidence that he committed the underlying offense of kidnapping.